PEMUNGUT HASIL TANAH DAERAH BARAT DAYA, PENANG v. KAM GIN PAIK & ORS.

[P.C. (Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Oliver & Lord Goff) January 20, 21 & February 12, 1986]

[Privy Council Appeal No. 12 of 1984]

Land Law – Land Acquisition – Application to quash award of Collector – Long delay between issue of notice and making of the award – Certiorari – Acquiring authority should act reasonably – Award of Collector quashed – No jurisdiction to quash notice of acquisition or to order possession of land to be returned to owners – Declaration that owners entitled to possession of land – Interpretation and General Clauses Ordinance, 1948, s. 38 – Government Proceedings Ordinance, 1956, s. 29(1)(b) – Land Acquisition Act, 1960, ss. 10, 12 & 68.

Administrative Law – Certiorari – Application to quash award of Collector of Land Revenue in land acquisition proceedings – Long delay between notice of acquisition and making of award – Land Acquisition Act, 1960, ss. 10, 12 & 68.

In this case a declaration was published in the Gazette on March 30, 1972 under section 8 of the Land Acquisition Ordinance, 1960, that certain lands including some in the ownership of the respondents were needed for residential, industrial and public purposes. The appellant gave notice of an inquiry under section 10(1) of the Act on March 22, 1979 and the appellant issued an award on February 7, 1980. The respondents obtained leave of the High Court to apply for certiorari to quash the appellant's award and subsequently made an application for certiorari upon a number of grounds, among them being (a) alleged contraventions of the rules of natural justice in the appellant's conduct of the inquiry leading to the award and (b) the question whether the delay between the publication of the section 8 declaration and the holding of the inquiry had the effect of invalidating the award. The High Court gave judgment in the respondent's favour and made an order (1) quashing the section 8 declaration and all subsequent proceedings including the inquiry and the award (2) declaring that any acquisition or taking possession by the appellant of the respondent's land was null and void and directing the Registrar of Titles to expunge from the titles to the land any entries to the contrary effect; (3) directing the appellant to deliver back to the respondents possession of any of their lands which he had taken; (4) finding the appellant liable to the respondents in costs.

The appellants appealed to the Federal Court which allowed the appeal in part. The Court reversed the finding of the trial judge that there had been contraventions by the appellant in the course of the inquiry of the rules of natural justice but they upheld his finding that the long delay between the publication of the declaration and the inquiry invalidated the award. On the other hand they held that the learned judge had no jurisdiction to quash the declaration and set aside that part of his order. They also held that having regard to section 29(1)(b) of the Government Proceedings Ordinance, 1956, the trial judge had no power to make an order against the appellants for delivery up of possession of the respondent's lands and accordingly set aside that part of the order. In other respects the Federal Court dismissed the appeal – see [1983] 2 M.L.J. 390.

The appellants appealed to the Yang di-Pertuan Agong and the respondents cross-appealed against the setting aside of the order for repossession and also against the decision that there was no breach by the appellant at the inquiry of the rules of natural justice.

Held: (1) in this case the delay of seven years between the publication of the section 8 declaration and the appellant's notice of inquiry had the effect that the latter was given in contravention of the statutory requirements and did not constitute a valid exercise of power. It follows that the learned trial judge and the Federal judge were correct in holding that the inquiry and the subsequent award were invalid and should be set aside. It is therefore unnecessary to consider the respondent's case upon the alleged contraventions in the conduct of the inquiry of the rules of natural justice;

(2) section 29(1)(b) of the Government Proceedings Ordinance, 1956, precludes an order being made against the Government, whose servant the appellant is, for the recovery of the land. The Federal Court rightly set aside that part of the order of the trial judge which ordered the appellant to deliver possession of the lands back to the respondents. What the Federal Court should however have gone on to do was to make an order in terms of section 29(1)(b) of the Ordinance declaring that the respondents were entitled as against the appellants to possession of the land;

(3) The Federal Court were right in setting aside that part of the order of the learned trial judge which quashed the gazette notification of the declaration under section 8 of the Land Acquisition Act, 1960. It is however perfectly clear that no proceedings can now follow upon it which would have the result of bringing about a valid acquisition or possession of the land on the part of the appellant.

Cases referred to:

(1) *Simpsons Motor Sales (London) Ltd.* v. *Hendon Corporation* [1963] Ch. 57, 82.
(2) *Simpsons Motor Sales (London) Ltd.* v. *Hendon Corporation* [1964] A.C. 1088, 1117.
(3) *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang* v. *Ong Gaik Kee* [1983] 2 M.L.J. 35.
(4) *R.* v. *London County Council, Ex parte Swan & Edgar (1927) Ltd.* (1929) 141 L.T. 590.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Donald Rattee Q.C. (*Peter Crampin* with him) for the appellant.

Karpal Singh (*Balwant Singh Purba* with him) for the respondent.

Cur. Adv. Vult.

Lord Keith of Kinkel (delivering the Judgment of the Board): This appeal and cross-appeal from the Federal Court of Malaysia are concerned with the validity of an award dated February 7, 1980

made by the Collector of Land Revenue, South West District, Penang, the appellant, purporting to assess compensation due in respect of the compulsory acquisition by the State Authority of certain lands owned by the respondents.

Section 3 of the Land Acquisition Act 1960, as amended, provides that the State Authority may acquire any land which is needed for, *inter alia*, any public purpose. Sections 4 to 6 provide for preliminary notification in the Gazette as to land likely to be needed for any of the purposes referred to in section 3, for entry to and survey of such land, and for compensation to be paid for any damage caused by such entry and survey. Section 7 provides for the submission to the State Authority by the Collector of Land Revenue of a plan showing the particular lands which it is necessary acquire and a list of such lands.

Section 8(1) provides:–

"(1) When the State Authority decides that any of the lands referred to in section 7 are needed for any of the purposes referred to in section 3, a declaration in Form D shall be published in the Gazette."

Under section 8(3) a declaration in Form D is conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified.

On March 30, 1972 there was published in the Gazette a section 8 declaration (G.N. 89) that certain lands, including some in the ownership of the respondents, were needed for "residential industrial and public purposes, namely recreation, health, education, police station and public roads."

Section 9 of the Act provides for certain action to be taken by the Collector in relation to lands which are the subject of a section 8 declaration, including the marking out of the lands and the noting on the title to the lands of the intended acquisition. Section 10 provides:

"(1) The Collector shall, having completed the action required by section 9, commence proceedings for the acquisition of the land by giving public notice in Form E, in the manner prescribed by section 52, and by fixing the date of an inquiry for the hearing of claims to compensation for all interests in such land.

(2) The Collector shall not hold such inquiry earlier than twenty-one days after the date of publication of the notice referred to in sub-section (1).

(3) ..."

On December 31, 1978, no action under section 10 of the Act having yet been taken by the Collector, the respondent Kam Gin Paik commenced proceedings in the High Court seeking, *inter alia*, a declaration that the acquisition of the respondent's lands was *mala fide*. This appeal is in no way concerned with these proceedings.

On March 22, 1979, the appellant gave notice of an inquiry under section 10(1), which appears to have opened on the same day but to have been adjourned to April 16, 1979. It was further adjourned, on the respondents' application, to December 8, 1979. The inquiry was actually commenced on that date and completed, after further adjournment, on December 31, 1979.

On February 7, 1980 the appellant issued an award, valuing the respondents' lands (including one lot from the acquisition of which the State Authority had, on July 19, 1979, withdrawn under section 38 of the Act of 1960) at $172,066.05, plus a sum of $21,700 in respect of certain buildings on the land. In terms of paragraph 1 of the First Schedule to the Act of 1960, the market value of the land fell to be determined as at the date of the publication in the Gazette of the section 4 notice in relation to the land, unless the section 8 declaration was published more than 12 months later, in which event the date of publication in the *Gazette* of that declaration was to be the relevant date. It does not appear which of these two dates was the appropriate one in the present case, but it is evident the date of valuation can have been no later than March 30, 1972. The respondents' valuer valued their land at $4,532,000 as at January 7, 1980.

On October 16, 1980 the respondents obtained leave of the High Court to apply for certiorari to quash the appellant's award, and also an order staying the taking of possession of the lands by the appellant. The respondents later made application for certiorari upon a number of grounds, which in the end of the day came to be reduced to two issues, the first being concerned with alleged contraventions of the rules of natural justice in the appellant's conduct of the inquiry leading to the award, and the second with the question whether the delay between the publication of the section 8 declaration and the holding of the inquiry had the effect of invalidating the award.

On April 8, 1983 Mustapha bin Hussain J.C. gave judgment in the respondents' favour on both these issues. He made an order (1) quashing G.N. 89 and all subsequent proceedings including the inquiry and the award, (2) declaring that any

acquisition or taking possession by the appellant of the respondents' land was null and void and directing the Registrar of Land Titles to expunge from the titles to the land any entries to the contrary effect, (3) directing the appellant to deliver back to the respondents possession of any of their lands which he had taken, and (4) finding the appellant liable to the respondents in costs.

It is not clear from the record whether or not the appellant had in fact taken possession of any of the respondents' land. As narrated above, the respondents had on October 16, 1980, obtained an order staying the taking by the appellant of possession of any of their lands. The immediate effect of the award, under section 18 of the Act of 1960, was to entitle the appellant to take possession of the land to which it related, and it may be that the order for a stay came too late as respects some part at least of the respondents' lands. Counsel for the appellant informed the Board that this was indeed the case, and that possession had been taken by his client some time between February and October 1980.

On appeal by the appellant the Federal Court (Abdul Hamid, Mohammed Azmi and Hashim Yeop A. Sani F.JJ.) on September 7, 1983 delivered judgment allowing the appeal in part. The Court reversed the finding of the learned trial judge that there had been contraventions by the appellant, in the course of the inquiry, of the rules of natural justice, but they upheld his finding that the long delay between G.N. 89 and the inquiry invalidated the award. On the other hand, they held that he had no jurisdiction to quash G.N. 89, and set aside that part of his order. They also held that, having regard to section 29(1)(b) of the Government Proceedings Ordinance 1956, the trial judge had no power to make an order against the appellant for delivery up of possession of the respondents' lands, and accordingly set aside that part of his order. In other respects the Federal Court dismissed the appeal.

The appellant now appeals, with leave of the Federal Court, to His Majesty the Yang di-Pertuan Agong. The respondents, also with leave, cross-appeal against the setting aside by the Federal Court of the order for repossession, and also against the decision that there was no breach by the appellant at the inquiry of the rules of natural justice.

The principal issue in the appeal is whether or not the Federal Court were correct in affirming the decision of the learned trial judge that the long delay between G.N. 89 and the inquiry into compensation vitiated the appellant's award and rendered it null. If that issue is decided in the respondents' favour it is unnecessary to deal with the cross-appeal so far as concerned with alleged breaches of the rules of natural justice in the conduct of the inquiry.

The principle to be applied in resolving this issue is well settled. It was thus stated by Upjohn L.J., as he then was, delivering the judgment of the Court of Appeal in *Simpsons Motor Sales (London) Ltd.* v. *Hendon Corporation*[1]:

> "... when a notice to treat has been served, it is the duty of the acquiring authority to proceed to acquire the land within a reasonable time. Mr. Molony, for the corporation, has argued that mere delay in proceeding to enforce the notice can never disentitle the acquiring authority from proceeding thereunder, but that some additional circumstance is necessary before the owner can object to the enforcement of the notice to treat against him. We do not accept this proposition. If the acquiring authority do not proceed within a reasonable time to acquire the property and pay the compensation, they may well lose their rights to enforce the notice. It would be most unreasonable to permit an acquiring authority, having given a notice to treat, to sit on their rights and defer enforcement of the notice until it suits them. Lord Romilly M.R. pointed out how unfair it would be on the owner in *Richmond* v. *North London Railway Co.* (1868) L.R. 5 Eq. 352, 358 nearly a century ago. How much more unfair it is today in an age of rapidly increasing land values! The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authority for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, but with due regard to the interests of the person being dispossessed. What is a reasonable time for this purpose must depend upon the facts and circumstances of each case."

This statement of principle was approved in the speech of Lord Evershed, unanimously concurred in, when the case was before the House of Lords on appeal.[2] Section 10 of the Land Acquisition Act 1960, which their Lordships have earlier quoted, plainly embodies this principle almost to the extent of making it explicit. By providing that the Collector "shall, having completed the action required by section 9, commence proceedings" for an inquiry into claims for compensation, subsection (1) has indicated in the clearest manner the intention of Parliament that these proceedings are to follow immediately upon the completion of the section 9 procedure. This was recognised by the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang* v. *Ong Gaik Kee*[3] where Salleh Abas C.J. (Malaya), delivering the judgment of the Court, said at page 38:—

"... looking at the Act as a whole no one could deny that the proceedings under the Act are meant to be in a continuous motion so that no such interruption or such undue delay or stoppage as to amount to an abandonment of the acquisition could be regarded as within this motion. Under section 38 of the Interpretion and General Clauses Ordinance, 1948 it is provided that –

> 'where no time is prescribed or allowed within which anything shall be done, such thing shall be done with *all convenient speed* and as often as the prescribed occasion arises.' (emphasis is ours)

What then is the 'convenient speed'? In our view it must be 'as soon as possible' or 'within a reasonable time', and not 'as late as possible'. Obviously what amounts to 'convenient speed' must vary from case to case and in our judgment seven years delay is certainly not a 'convenient speed' as it is so far outside the normal period of time that no reasonable authority could ever regard it as reasonable. That being the case the court is entitled to strike down the impugned acquisition proceedings as illegal."

Their Lordships respectfully agree with this passage subject to the observation that the reference to abandonment of the acquisition by the acquiring authority may be misleading. As was made clear in the *Simpsons Car Sales* case *(supra)*, the question whether the right to proceed with acquisition proceedings has been lost by delay is a separate question from that whether the acquisition has been abandoned. Delay contrary to the express or implied statutory requirements is in itself a ground invalidating proceedings which follow such delay, without the necessity of any inference that the acquisition has been abandoned.

Applying these principles, their Lordships are of opinion that in this case the delay of 7 years between G.N. 89 and the appellant's notice of inquiry on March 22, 1979 had the effect that the latter was given in contravention of the statutory requirements and did not constitute a valid exercise of power. No attempt was made to justify or explain the delay. Counsel for the appellant could argue only that the respondents, not having taken any steps to prevent the inquiry being held, but on the contrary having allowed it to proceed to the stage of an award, were not now entitled to have the proceedings set aside. It was sought to distinguish the *Pemungut Hasil Tanah* case, *(supra)*, on the ground that there the landowner had objected, albeit ineffectually, to the holding of the inquiry. Their Lordships reject this argument. Failure to object *ab ante* to an illegal proceeding cannot convert it into a legal one. Reliance was also placed on section 68 of the Act of 1960, which provides:–

> "No suit shall be brought to set aside an award or apportionment under this Act."

In the *Pemungut Hasil Tanah* case *(supra)*, it was held, on the authority of *R.* v. *London County Council Ex parte Swan & Edgar (1927) Ltd.*[4] that the word "suit" in section 68 did not include certiorari. Their Lordships agree and hold that upon that ground section 68 is no answer in the present case.

It follows that the learned trial judge and the Federal Court were correct in holding that the inquiry and subsequent award, upon the grounds which their Lordships have examined, were invalid and should be set aside. It is therefore unnecessary to consider the respondents' case upon alleged contraventions in the conduct of the inquiry of the rules of natural justice.

A valid award was a prerequisite of the appellant's right to take possession of the respondents' lands under section 18 of the Act of 1960. There having not been a valid award he was not entitled to do so and is therefore under a duty to restore possession to the respondents. However, their Lordships agree with the Federal Court that section 29(1)(b) of the Government Proceedings Ordinance 1956 precludes an order being made against the Government, whose servant the appellant is, for the recovery of the land. So the Federal Court rightly set aside that part of the order of the learned trial judge which ordered the appellant to deliver possession of the lands back to the respondents. What the Federal Court should, however, have gone on to do was to make an order, in terms of section 29(1)(b), declaring that the respondents were entitled as against the appellant to possession of the land.

The Federal Court also set aside that part of the order of the learned trial judge which quashed G.N. 89 dated March 30, 1972. Here again, their Lordships consider that they were right to do so. G.N. 89 was entirely valid when made, and nothing has happened since which can have the effect of invalidating it. It is, however, perfectly clear that no proceedings can now follow upon it which would have the result of bringing about a valid acquisition or possession of the land on the part of the appellant. The proceedings under section 10 of the Act of 1960 which were commenced on March 22, 1979 having been held invalid on the ground of delay, any future similar proceeding based on G.N. 89 would *a fortiori* be invalid. In the result, G.N. 89 has proved to be a *brutum*

fulmen. However, a note of the intended acquisition of the land has been made upon the register document of title to the land under section 9(2) of the Act of 1960, and that clearly must have the effect of inhibiting any dealings with it. The order of the learned trial judge required the Registrar of Titles to expunge from the register any entries, such as would presumably have been made under section 23 of the Act of 1960, indicating that the land had been acquired or taken into possession by the State Authority, and the Federal Court did not interfere with that part of the order.

So the final result should be that the appeal and cross-appeal are dismissed, but that the orders of Mustapha bin Hussain J.C. and of the Federal Court are varied to the effect, (1) of deleting from paragraph (b) of the former order the words "such entries" in the antepenultimate and penultimate lines and by adding at the end of the paragraph the words "all entries relating to the intended acquisition of the said land made in pursuance of G.N. 89 dated March 30, 1972 and all entries relating to acquisition of the said land by the State Authority made under section 23 of the Land Acquisition Act 1960", and (2) by substituting for paragraph (c) of the former order a declaration that the applicants are entitled, as against the State Authority, to the said lands and to the possession thereof.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong accordingly. The appellant must pay the respondents' costs of the appeal and cross-appeal. The appeal has failed and although the cross-appeal has been formally dismissed it has not added to the costs of proceedings before the Board, the respondents having for all practical purposes secured complete success upon the merits of the case. The respondents claimed that the Federal Court should have awarded them the costs of the proceedings there, instead of making no award to either party, but their Lordships are not disposed to interfere with the discretion of the Federal Court in that respect.

Order accordingly.

Solicitors: *Stephenson Harwood; Hatchett Jones & Kidgell.*

SINGAPORE REPORTS

JACK CHIA-MPH LTD. v. MALAYAN CREDIT LTD.

[C.A. (Wee Chong Jin C.J., Kulasekaram & Lai Kew Chai JJ.) April 19, 1984]

[Singapore – Civil Appeal No. 93 of 1982]

Practice & Procedure – Joint tenancy – Application for equal partition or sale – When court may grant order of sale – Supreme Court of Judicature Act (Cap. 15), First Schedule, para. 3.

Landlord & Tenant – Lease – Joint tenancy – Application for equal partition or sale – Exercise of court's powers in ordering sale – Supreme Court of Judicature Act (Cap. 15), First Schedule, para. 3.

On November 30, 1979 United Overseas Land Ltd. granted a lease on the 7th floor of Malayan Credit House to the appellants and the respondents. The lease was for a term of five years with an option to renew for two further terms of two years and three respectively. No words were added in the grant to indicate that the lessees were to take separate interests. By this lease the appellants and the respondents became joint tenants and each had an identical interest in the whole land and every part of it. After the lease was entered into the parties requested the lessor to render separate bills to each co-lessee in the same proportions and thereafter each party paid its agreed share of the rent directly to the lessor. Subsequently differences arose between the two parties which led to the appellants seeking an order for equal partition or for sale with equal division of the net proceeds of sale. In the court below the application was dismissed. The appellants appealed.

Held, allowing the appeal: having regard to the differences between the parties and the fact that each has an equal right to all parts of the 7th floor and neither may lawfully exclude the other from any part thereof, the *status quo* could not be maintained indefinitely and it was necessary and expedient for the court to order a sale in the exercise of its power under paragraph 3 of the First Schedule to the Supreme Court of Judicature Act (Cap. 15).

[**Editorial Note**: The respondents appealed to the Privy Council against the Court of Appeal's decision in Privy Council Appeal No. 33 of 1984. The decision of the Court of Appeal was varied by the Privy Council. The decision of the Board will be reported in the next issue of the *Journal.*]

Case referred to:

(1) *Williams* v. *Hensman* (1861) 1 John & H. 546; 50 E.R. 862.

COURT OF APPEAL.

Harry Elias (*Tan Joo Seng* with him) for the appellants.

M. Karthigesu for the respondents.

Cur. Adv. Vult.